ISSN 1712-4506 (Online)

Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

July 2013

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. These decisions will appear in the May/ June issue of the OLRB Reports. The full text of recent OLRB decisions is now available on–line through the Canadian Legal Information Institute at www.canlii.org.

Certification Where Act Contravened – Construction Industry – Membership Evidence – Practice and Procedure – Remedies – Unfair Labour Practice – The union sought remedial certification pursuant to s. 11 of the Act – A preliminary issue arose concerning the sufficiency of Form A-74 [Declaration Verifying Membership Evidence], including whether the electronic signature of counsel for the union was sufficient – Although the Board found that declarants would be well advised to use pen and ink to avoid an inquiry, as long as the Board is satisfied that the declarant took steps to assure himself or herself of the representations made in the Form, then a declarant can validly execute a Form A-74 by using an electronic signature – The Board found that one of the five sons involved in the management of their father's companies asked three employees if they had signed membership cards, and that this constituted a violation of sections 70 and 76 of the Act – The Board also found that the lay-off of two of these employees was due in part at least to their support for the union, which was also a violation of the Act – Concerning the request for remedial certification, although the Board was concerned by the fact that the inside organizer and a union supporter were each laid off in violation of the Act, typically warranting remedial certification, these proceedings suggest a different result for the following reasons: first, there was no evidence that any employees knew that Allard was an insider organizer and accordingly their layoffs could not have affected the true wishes of the employees; second, the layoffs occurred in the context of an organizing drive that had been largely unsuccessful (after an earlier one which was unsuccessful); third, there was no evidence that company management committed unfair labour practices – As no other remedy was requested other than remedial certification, the Board made a declaration of violations of the Act – Certification application dismissed

BARNE BUILDING AND CONSTRUCTION INC., RE: United Brotherhood of Carpenters and Joiners of America, Local 2486; RE: 510750 ONTARIO o/a CITADEL HOLDINGS; RE: 510532 ONTARIO o/a CITADEL ENTERPRISES; RE: 510549 ONTARIO LIMITED; OLRB File No. 0574-10-R; 0575-10-U; Dated June 3, 2013; Panel: Lee Shouldice (45 pages)

Change in Working Conditions – Unfair Labour Practice – Local 647 displaced the Teamsters after a representation vote – The Teamsters' Benefit Trust Fund no longer provided benefits to the employees and the plan put in place by the employer prior to a new collective agreement with Local 647 did not exactly compare with the Teamsters' plan, particularly it did not include short term disability benefit, nor did it cost the employer a comparable monthly amount – The Board noted that the employees had been

protected by a plan which at various times could not financially maintain all the original benefits and hence the objectively reasonable expectations that employees could claim would be some form of benefit coverage that was reasonably comparable to that provided by the Teamsters – Given that the interim plan's only shortfall was a lack of short term disability, the company had satisfied the "pattern of employment" approach when viewed alongside "reasonable expectations of the employees" – Accordingly the company did not improperly alter a term or condition of employment – Application dismissed

GATE GOURMET CANADA LTD.; RE: MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647; OLRB File No. 3688-11-U; Dated June 18, 2013; Panel: Maurice A. Green and J.A. Rundle (15 pages)

Collective Agreement – Construction Industry – Employer Support – Voluntary Recognition – Local 598's voluntary recognition agreement for masonry restoration work with Limen was challenged during its first year by the Labourers and Bricklayers – The Board dealt with whether the VRA was a valid pre-hire collective agreement pursuant to *Nicholls-Radtke* – The Board noted that *Nicholls-Radtke* was a limited exception carved out from what earlier jurisprudence would have held amounted to employer support – What *Nicholls-Radtke* amounts to is the Board recognizing the reality (in the construction industry at least) that when there are no pre-existing bargaining rights and no employees, and an employer signs a pre-hire agreement and actually employs members of that union in accordance with that pre-hire agreement, there is no real question of the employees' choice of bargaining agent – The Board did not agree with the argument that the bargaining unit was "empty" simply because the agreement was for a bargaining unit of "masonry restoration employees", a craft for which only Local 598 is designated – There was no dispute that prior to the Local 598 agreement, members of the Labourers and Bricklayers were performing the masonry restoration work for Limen under their respective collective agreements – After the agreement was signed and Local 598 began performing masonry restoration work grievances were filed by the Bricklayers and Labourers – The Board found it defied logic to define the bargaining unit as empty in these circumstances – The Board then addressed its jurisprudence in certification applications (which test the representational authority of a union before issuing a certificate) where claims of unions already there to the same jurisdiction are left to subsequent jurisdictional disputes – Those checks are not present when, rather than applying for certification, a union enters into a voluntary recognition agreement; accordingly proper questions of the legitimacy of bargaining rights (particularly when they are voluntarily acquired and in circumstances raising questions of employee choice or employer support) cannot be put off by hiding them as jurisdictional disputes – Finally, the Board listed a number of factors as to why there was no basis to exercise its discretion not to make the declaration – Voluntary recognition agreement invalid

LIMEN GROUP LTD.; RE: BRICK AND ALLIED CRAFT UNION OF CANADA; RE: ONTARIO PROVINCIAL CONFERENCE OF THE INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS; RE: BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2; RE: INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 2; RE: OPERATIVE PLASTERERS', CEMENT MASONS', AND RESTORATION STEEPLEJACKS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA UNION LOCAL 598; RE: MASONRY INDUSTRY EMPLOYERS' COUNCIL OF ONTARIO; RE: ONTARIO MASONRY CONTRACTORS' ASSOCIATION – BACU BARGAINING COMMITTEE; OLRB File No. 1903-12-G; 2088-12-G; 2089-12-G; 2093-12-G; 2111-12-G; 2279-12-G; 2342-12-G; 2733-12-G; 3050-12-G; 3091-12-G; 3361-12-G; 0194-13-G; 0405-13-G; 2169-12-R; 2176-12-R; 2170-12-U; 2177-12-U; 2418-12-JD; 2421-12-JD; 2423-12-JD; 2430-12-JD; 2431-12-JD; Panel: Bernard Fishbein (23 pages)

Bar – Construction Industry – Termination – Timeliness – In April 2010 Local 1 gave notice to bargain a new collective agreement – A conciliation officer was appointed; the parties never met with the officer and no "no board" was ever issued – Additionally, the parties never signed a collective agreement, but simply agreed to apply to their relationship the terms relating to Board Area 8 that were negotiated by MCAT and the MCUTV in its master agreement effective May 1, 2000 to April 30, 2003 – First, the Board held that the parties' Memorandum of Agreement did not bind Neivex to the master collective agreement, rather it permitted the interest arbitrator to impose the "terms and conditions" of the master collective agreement to their 2007-2010

agreement – Second, the Board reviewed *Signature Contractors*, which recently held that the Act does not contemplate or permit the continuing appointment of a conciliation officer to act as an indefinite bar to a displacement certification application or a termination application, and agreed with its findings – The Board found that the underlying mischief that concerned the Board in *Signature Contracting* was very much present in this proceeding even though the former dealt with s. 67(1) and the latter 67(2) – It acknowledged that *Signature Contractors* established a new point of departure for the Board for the purpose of determining the timeliness of representation applications in the face of an ongoing appointment of a conciliation officer and clearly reinforces that decision – Finally, the Board notes that where the Act, interpreted in a purposive manner, clearly reflects that the rationale for the initial appointment of the conciliation officer has been spent, and where the interpretation of the Act urged by Local 1 would lead to absurdities and a failure to achieve the objects of the Act, it is appropriate to interpret the Act in a manner that finds the application to be timely – Matter continues

NEIVEX MASONRY INC.; RE: PEDRO LARANJEIRA; RE: BRICKLAYERS, MASONS INDEPENDENT UNION OF CANADA, LOCAL 1; OLRB File No. 0441-13-R; Panel: Lee Shouldice (23 pages)

Related Employer – Sale of Business – Local 261 alleged that a sale of business occurred when Service Star assumed the cleaning and maintenance from ARAMARK at a Carling Avenue location – Local 261 relied primarily on the continued employment of the predecessor's employees and the continuity of the work – The Board found however that there was nothing pled to suggest the assumption of janitorial work was anything other than a "loss of work to a competitor" – The Board noted that there was no allegation regarding any "commercial history" between ARAMARK and Service Star that suggested anything other than that they were and remain competitors in the janitorial industry – There was no nexus or "necessary link" between ARAMARK and Service Star that could be construed as resulting in the transfer of the business from the former to the latter – Application dismissed

SERVICE STAR BUILDING CLEANING INC.; RE: HOSPITALITY & SERVICE TRADES UNION, LOCAL 261; RE: ARAMARK CANADA LTD.; RE: SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 2; RE: BREWERY, GENERAL & PROFESSIONAL WORKERS' UNION; OLRB File No. 3038-12-R; Panel: Tanja Wacyk, Richard O'Connor and Shannon McManus (14 pages)

COURT PROCEEDINGS

Construction Industry – Judicial Review – Reasonable Apprehension of Bias – Unfair Labour Practice – The applicants sought judicial review of a Board decision ([2012] OLRB Rep. Mar/April 302) and reconsideration ([2012 CanLII 50145 (ON LRB]) dismissing their complaint as the Board found there was no labour relations purpose to enquire into it – The Vice-Chair had been asked to recuse himself as he had acted as counsel for one of the applicants seven years previously – The Vice-Chair declined to recuse himself since he had no knowledge of the terms of the individual's contract; the applicants could not, in any event, explain what prior facts were presently at issue before the Board; and there was no possibility of the Vice-Chair being called as a witness – The Court quashed the Board's decision, on the basis of a "conflict" finding that the Board had misapplied the test in *McDonald Estate*, and also found the Board erred in its application of the test for an appearance of bias – The court held that a reasonable person would have serious difficulty with the concept that a lawyer, who had once acted for a client on a particular matter, would then sit in judgment on another matter involving that same client where very similar, if not identical issues, are raised – Finally, although the applicants had not raised this matter at the first opportunity, the court found the need for the appearance of fairness and impartiality was simply too important a concept to be defeated by that consideration alone – Board decision quashed

TERCIERA, MELO; LABOURERS INTERNATIONAL UNION OF NORTH AMERICA AND OLRB; OLRB File No. 1475-11-U (Court File No. 520/12); Dated June 6, 2013; Panel: Molloy, Nordheimer and Harvison Young JJ. (7 pages)

Certification – Construction Industry – Membership Evidence – Judicial Review – Reconsideration – The Board had certified the union and refused to reconsider its certification decision based on an allegation that an employee had not signed a membership card – The Board

found that the employer delayed too long in making inquiries and in communicating with the Board once it had the information; the Board had lost possession of the cards (it had returned the cards to the union); and the evidence offered was ambiguous – A majority of the court found it was reasonable for the Board to consider delay as one factor in its decision; that it was reasonable to consider the entire period of delay and the inadequate explanation for the delay in its deliberation; and when the reasons are read as a whole the Board's decision was justifiable, transparent and intelligible and its decision not to exercise its discretion to consider the employer's allegation fell within the range of possible, acceptable outcomes – The minority found the determinative factor in the Board's decision not to reconsider was that the membership evidence had been returned to the union, and that it was unreasonable not to consider the matter without first determining if the original evidence still existed and the actual prejudice from the delay – Application Dismissed

VITO TARANTINO LTD.; LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, 2013 AND OLRB; OLRB FILE NO. 0356-12-R (Court File No. 417/12) Dated June 3, 2013; Panel: Molloy, Hambly, and Herman J.J (13 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Milk and Bread Drivers Divisional Court No. 276/13	3688-11-U	Pending
Robert Pardy Divisional Court No. 2004/13 **London**	0501-12-ES	Pending
LIUNA, Local 625 Divisional Court No. 231/13	3315-12-R 3316-12-R 3317-12-R	Pending
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	Pending
Weihua Shi Divisional Court No. 158/13	0273-10-ES	Pending
Rail Cantech Divisional Court No. 127/13	1506-12-U	Pending
Defence Contract Management Agency Americas (Canada) (No. 2) Divisional Court No. 86/13	0955-11-R	Pending
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	Allowed (Seeking Leave to CA)
Defence Contract Management Agency Americas (Canada) Divisional Court No. 513/12	0955-11-R	Allowed (Seeking Leave to CA)
Bur-Met Construction Divisional Court No. DC-12-010	3893-11-R	Pending
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	Pending
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	Heard, Reserved
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al ''(Flynn) Divisional Court No. 325/12	2730-11-JD	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Heard, Reserved
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR **Hamilton**	2519-11-R	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **London**	1155–10–U	Pending

Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473–08–U	(Seeking Leave to CA)
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above